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COMMUNITY-INVESTOR ENVIRONMENTAL CONFLICTS: SHOULD AND COULD THEY BE ARBITRATED?

*Ciprian N. Radavoi**

ABSTRACT

Communities that do not consent to noxious environmental projects have access to negotiation and mediation as alternative dispute resolution (ADR) tools. The absence of arbitration from the list of available ADR mechanisms cripples the process of investor-community engagement. This paper proposes “Community-Investor Environmental Arbitration” (CIEA) as prospective interest arbitration meant to establish long-term agreement between the parties to contentious environmental projects, similar to the role played in the U.S. by arbitration used in cases of deadlocks in collective labor agreement bargaining. The first part of the paper discusses normative, procedural, and instrumental factors that make CIEA desirable; also, it details its technicalities such as jurisdiction, applicable law, and procedures. In the second part, the paper suggests solutions for overcoming the likely rejection of CIEA by corporations. The solutions imply leveraging on values and interests at international organizations and/or government levels; as such, the paper gradually evolves from a transformative paradigm in the stage of problem identification, towards a pragmatic stance in the solution it proposes.

Key words: ADR; environmental dispute; interest arbitration; local community; noxious project.

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INTRODUCTION

Rules of investor-community interaction bypass state involvement to a large extent, and the key word is “engagement,” which is recommended in codes of conduct at company, industry, or country levels all over the world. Investors commit to meaningfully engage communities prior to beginning the project, aiming to obtain their consent. Academics became increasingly interested in this mechanism. As a result, there are now on average thirty studies per year dealing with community engagement by investors, as compared to the less than five studies per year before 2000.¹ However, the literature on community engagement is silent on what should happen if communities withhold consent based on environmental concerns.²

The investor-community ADR solutions already applied include negotiation, conciliation, and mediation. Currently, arbitration is not seen as an option, although its presence on the list of ADR alternatives would be only logical. This paper therefore proposes CIEA as inspired from interest labor arbitration in the United States, applied in cases of deadlocks in collective labor agreements. After discussing the justification and conceptual feasibility of such a solution (*infra* at Section 2), the article outlines some features of CIEA (*infra* at Section 3). A thorny foreseeable issue, corporate opposition to such arbitration, is discussed in section 4, where it is shown that the involvement of either a development lender or a government might be necessary. The discussion is kept in a European perspective, as the Aarhus Convention³ operationalizes environmental participatory rights further than elsewhere, and thus the ground for CIEA may be more fertile. However, any democratic country may find this policy suitable.

¹ Frances Bowen, Aloysiu Newenham-Kahindi & Irene Herremans, *When Suits Meet Roots: The Antecedents and Consequences of Community Engagement Strategy* 95 J. BUS. ETHICS 297, 301 (2010).

² Ciprian N. Radavoi, *Local Community Between Government's Assurances and Investor's Expectations*, in CORPORATE RESPONSIBILITY AND SUSTAINABLE DEVELOPMENT: EXPLORING THE NEXUS OF PRIVATE AND PUBLIC INTERESTS 81, 94 (Lez Rayman-Bacchus & Philip Walsh eds., 2015).

³ See *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (Aarhus Convention, 1998), 38 ILM 517 (1999).

I. NORMATIVE, PROCEDURAL AND INSTRUMENTAL REASONS

A. *COMPLETING THE RIGHT TO PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONS*

The right to public participation in environmental matters⁴ needs to be complete if there is to be “the right of the rights,” as Waldron⁵ sees it. At least in its private manifestation, in the encounter between investors and local communities, participation should entail the right to refuse participation at some point along the engagement process. Otherwise, it would be an obligation rather than a right and a trap meant to legitimize governmental and corporate action. Without providing procedures for obtaining communities’ consent and without a right to veto, at least in cases where the right to Free, Prior, and Informed Consent (FPIC) is uncontested,⁶ the right to participate in environmental decision is crippled.

Moreover, there is a constant, though still unclear, extension of the right to FPIC from indigenous peoples to all communities affected by potentially polluting projects. While initially reserved to indigenous communities and to some extent communities with other sociological identifiers, such as race or income, the right to FPIC is lately advocated in a broader perspective. The World Resources Institute, for example, argues:

⁴ Enshrined for example in United Nations Conference on the Environment and Development (UNCED), Rio Declaration, adopted on 13 June, Rio de Janeiro, A/CONF. 151/26 (Vol. I), Annex I (1992), <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (Referring to Principle 10 as “the active participation in [environmental] decision-making of those affected groups that have often been excluded, such ... local communities”).

⁵ Jeremy Waldron, *Participation: The Right of Rights*, 98 PROCEEDINGS ARISTOTELIAN SOCIETY 307 (1998). (Explaining the special role of participation in the theory of rights based on its quality of being a right whose exercise is needed in situations where right-bearers disagree about what other rights they have).

⁶ Indigenous peoples’ right to free, prior and informed consent (FPIC) about activities that impact their lands is enshrined in UNITED NATIONS, DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2008), now benefitting of worldwide support. FPIC is operationalized in various standards and policies, see, e.g., WORLD BANK, OPERATIONAL POLICY 4.10: INDIGENOUS PEOPLES (2005).

Although the right to FPIC is more firmly entrenched for indigenous communities, there is a growing recognition that *all communities* should have a meaningful role in making decisions about projects that directly affect them, *including the ability to refuse to host projects* that do not provide adequate benefits or help them to realize their development aspirations.⁷

The corporate world does not openly reject this view, and the mining industry even commits to obtain from communities a Social License to Operate (SLO). In these circumstances, one may expect clear procedures for communities to negotiate their consent, with all outcomes open, including a failure of negotiations. But a look at the available mechanisms of ADR in cases of corporation-community disagreement suggests a piece of the puzzle may be missing.

In the scenario discussed here, namely when a community says “no” to proposed governmental and/or private development of a potentially polluting project in the community’s vicinity, there are several judicial or quasi-judicial mechanisms to make this “no” be heard. In the realm of public law, most judicial systems provide citizens with avenues to challenge environmental decisions, such as permits issued to developers. In New Zealand, concerned communities can petition in specialized courts to express their worries, or they can, in cases of corporate environmental wrongdoing, bring claims of compliance and redress. In the realm of private law, assuming that the environmental laws of the host country are respected but the community is still unhappy with the project in its backyard, ADR mechanisms are applied, either under the coordination of an official body – like in New Zealand, where the mediator is a commissioner of the Environmental Court⁸ – or entirely privately.

When it comes to court-related ADR, certain stipulations including, for example, the Resource Management Act of New Zealand, limit a protesting community’s options to mediation,

⁷ World Resources Institute (WRI), *Development without Conflict: The Business Case for Community Consent* 9. Washington, DC, May 2007 (emphasis added).

⁸ Franklin E. Dukes, *What We Know about Environmental Conflict Resolution: An Analysis Based on Research*, 22 CONFLICT RESOL. Q. 191, 193 (2004).

conciliation or other procedures designed to facilitate the resolution of any matter before or during the course of a hearing.⁹ The problem is that the ADR used in entirely privately managed environmental disputes is also limited to negotiation and mediation, as if it was out of the question that after these phases, a deal would not be reached between corporations and affected citizens or communities. This brings about a bias towards the investor; an idea that was captured in a discussion of the pros and cons of environmental ADR in the New Zealand system:

Environmental mediation contains an inherent bias in favor of development as the dispute is portrayed as a clash between different, but equally valid, interests. Compromise between the two becomes the logical solution to the problem.... A compromise between the parties is closer to filling the goals of the developer than the goals of the submitter.¹⁰

Some authors who note the shortcomings of environmental mediation limit their discussion to proposing solutions for overcoming said limits within the mediation process¹¹; the arbitration option is ignored. Even the authors who commit to discussing environmental ADR generally end up discussing mediation only. For example, an author who entitled his paper *Examining the Claims of Environmental ADR* notes in his introduction that “[t]he three principal ADR methods are negotiation, facilitation, and mediation,”¹² and only deals with these resolution mechanisms,

⁹ Resource Management Act 1991, para 268.

¹⁰ Kate Mitcalfe, *Fronting up - mediation under the Resource Management Act 1991*, 5 NEW ZEALAND J. ENVTL. L. 195, 225 (2001).

¹¹ Guy Burgess & Heidi Burgess, *Environmental Mediation: Beyond the Limits. Applying Dispute Resolution Principles to Intractable Environmental Conflicts* (Conflict Research Consortium, Univ. of Colorado at Boulder, Working Paper No. 94-50, 1994), http://www.colorado.edu/conflict/full_text_search/AllCRCDocs/94-50.htm.

¹² John S. Andrew, *Examining the Claims of Environmental ADR: Evidence from Waste Management Conflicts in Ontario and Massachusetts*, 21 J. PLANNING IN EDUC. & RES. 166, 166 (2001).

seemingly forgetting about arbitration. In fact, the academic literature focuses almost exclusively on mediation.¹³

A simple question then comes to mind: why is a dispute that is mediatable not also arbitrable? That mediation is as an ethical adjunct of stakeholder theory, as it was claimed,¹⁴ is a perspective hardly acceptable given the numerous signals of corporate manipulation and intimidation in the mediation process. If this view is accepted, mediation needs its own ‘ethical adjunct,’ not controlled by the corporation or its hired professionals. This could be arbitration. However, only one author has so far suggested the use of non-binding arbitration albeit without elaboration.¹⁵

B. A NECESSARY PROCEDURAL COMPLEMENT TO STATE WITHDRAWAL

Zooming out towards the multi-layered, pluralist governance specific to the globalized world, it is worth noting that state withdrawal from most transactions has left communities and corporations to negotiate directly with one another on many social and environmental-related aspects of private direct investment projects. Under these circumstances, fair procedural instruments are the only tools to ensure equity and distributive justice.

For a quarter-century, analysts have been preoccupied with the move from government to governance – with the meaning of ‘governance’ shifting away from the traditional ‘what governments do’ to ‘what the government and other centers of power do.’¹⁶ While the emergence of polycentric sources of power is unanimously acknowledged and explained through a mixture of globalization and localization, the exact role reserved to the state in the new governance is not agreed upon among scholars. For Osborne and

¹³ Tania Heikkila & Edella C. Schlager, *Addressing the Issues: The Choice of Environmental Conflict-Resolution Venues in the United States*, 56 AM. J. POL. SCI. 774, 775 (2012).

¹⁴ Mark Lampe, *Mediation as an Ethical Adjunct of Stakeholder Theory*, 31 J. BUS. ETHICS 165 (2001).

¹⁵ Cedric E. Dawkins, *The Principle of Good Faith: Toward Substantive Stakeholder Engagement*, 121 J. BUS. ETHICS 283 (2014) (arguing for the necessity of good faith in the community dialogue with investors).

¹⁶ James N. Rosenau, *Governance in the Twenty-first Century*, 1 GLOBAL GOVERNANCE 13, 14 (1996).

Gaebler,¹⁷ the state has turned into an enabler, 'steering' but not 'rowing.' For Taylor, governance in its turn was already replaced by (neoliberal) governmentality, whereby state power became decoupled from the state as government and is instead produced through a range of sites and alliances at a distance from or beyond the state.¹⁸ For Randeria,¹⁹ the world is not dealing with weakening states, but with cunning states eager to capitalize on their perceived weakness in order to render themselves unaccountable to their citizens.

The discussion of the causes and mechanisms of state withdrawal is complex and beyond the scope of this paper. This article is also not about what the state should do. Obviously, the state should be more responsive to the will of people when they oppose, on environmental grounds, the will of industry.²⁰ What matters from this paper's perspective is that the tendency towards at least partially relocating authority is visible in every continent and every country²¹ and that local communities are, in theory, among the new centers of power, together with the multinational corporation. In practice, however, "[w]hile power is increasingly vested in global corporations, the responsibility for welfare is pushed down the line to local, community and individual levels, with risks borne by those least able to bear them."²²

¹⁷ DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* (1992).

¹⁸ Marilyn Taylor, *Community Participation in the Real World: Opportunities and Pitfalls in New Governance Spaces*, 44 *URBAN STUD.* 297, 300 (2007).

¹⁹ Shalini Randeria, *Glocalization of Law: Environmental Justice, World Bank, NGOs and the Cunning State in India*, 51 *CURRENT SOCIOLOGY* 305, 306 (2003).

²⁰ See, e.g., Roger Field, *Children, Community and Pollution Control: Toward a Community-oriented Environmentalism*, 2 *CHILDHOOD* 28, 36 (1994), pleading for the use of mechanisms for enhanced participation like Citizens Advisory Boards, which would have a right to initiate and veto projects.

²¹ Rosenau, *supra* note 16, at 18.

²² Taylor, *supra* note 18, at 301.

In a force fields theoretical perspective,²³ unleashing the competing forces that were previously contained by state presence turns the encounter into an ad hoc confrontation of the remaining actors' resources, abilities, and luck.²⁴ Democracy itself needs reconstruction to adapt to these changes and this necessarily entails empowering citizens and communities.²⁵ In other words, state withdrawal has to be counterbalanced with providing communities with effective tools to rebalance the force field and democratically participate in a global pluralist world. One of these tools could be the entitlement to arbitrate consent to environmental activities.

*C. FILLING A PROCEDURAL GAP IN INTERNATIONAL ENVIRONMENTAL
ADJUDICATION*

The lack of mechanisms for international environmental adjudication opened to those who actually suffer from environmental harm is of notoriety. Access to international courts is limited to states, for example, through the International Court of Justice, which has been called to decide several cases with environmental implications, but never through its Chamber for Environmental Disputes, which was established in 1993. States can also litigate environmental issues under the World Trade Organization where several cases of alleged breaches of the free trade principles were decided with reference to the General Exemptions. The General Exemptions recognize state regulatory autonomy in the environmental field. However, environmental harm is often caused by corporations and the consequences are borne by local communities, neither of which have access to international litigation. The existing coherent normative regimes developed along various topics (biodiversity, climate change etc.) and the environmental principles universally agreed upon (precautionary principle, polluter

²³ Monique Nuijten, *Power in Practice: A Force Field Approach to Natural Resource Management*, 4 J. TRANSDISCIPLINARY ENVTL STUD. 1, 3 (2005) (arguing that force fields are shaped around the access to specific resources. In a force field, "... the patterning of organizing practices is not the result of a common understanding or normative agreement, but of the forces at play within the field.").

²⁴ Turid Hagene, *Everyday Political Practices, Democracy and the Environment in a Native Village in Mexico City*, 29 POL. GEOGRAPHY 209 (2010).

²⁵ Jan A. Scholte, *Reconstructing Contemporary Democracy*, 151 IND. J. GLOBAL LEGAL STUD. 305 (2008).

pays, sustainable development etc.) are not completed with an international adjudication mechanism opened to non-state actors.

This is a lacuna to which the international community of lawyers, scholars, or civic organizations has recently reacted with intensity. As a result, several arbitral mechanisms have already been privately adopted. The most successful private arbitral mechanism is the ‘Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment’ developed by the Permanent Court of Arbitration (PCA). The PCA is an intergovernmental organization with 121 member states designed to facilitate arbitration and other forms of dispute resolution between states. The Optional Rules are the first mechanism to allow broad standing for non-state entities in arbitral disputes regarding the environment. Among previous environmental dispute resolution mechanisms, only the International Convention on the Law of the Sea (ITLOS) and the United Nations Framework Convention for Climate Change (UNFCCC) allowed for limited intervention by private parties.²⁶

The PCA rules are construed in such a broad manner that they appear procedurally suitable to any conceivable environment related dispute.²⁷ Other initiatives of the same type were less successful: the International Court of Environmental Arbitration and Conciliation established in Mexico in 1994 was set to accept claims brought by states, corporations and individuals, but has not received any request for arbitration.

More ambitious legal creations, like the International Environmental Court (IEC), are lately advocated in an attempt to fill the accountability gap in the international environmental law.²⁸ The World Bank (WB) attempted to resolve the problem of victims’

²⁶ For UNCLOS, see ELLEN HEY, REFLECTIONS ON AN INTERNATIONAL ENVIRONMENTAL COURT (2000). For UNFCCC, see UNFCCC, *Subsidiary Body for Implementation* 9-10. Report of the Subsidiary Body for Implementation(Addendum). Draft text under consideration by the Subsidiary Body for Implementation, UN Doc FCCC/SBI/2012/33/Add.1, 7 March 2013.

²⁷ See *infra* at Section II for a discussion on PCA as one possible forum for CIEA.

²⁸ See, e.g., Philip Riches & Stuart A. Bruce, *Building an International Court for the Environment: A Conceptual Framework*. Governance and Sustainability Issue Brief Series, Paper 7 (2013).

rights to redress in cases of environmental wrongdoing by its borrowers via the mechanism of Inspection Panel. Aside from the fact that IEC remains at the stage of ideal and a contested way to go forward,²⁹ and the WB Inspection Panel only endorses complaints stemming from a borrower's serious failure to comply with Bank policies,³⁰ both these initiatives have drawbacks related to their focus on compliance and compensation for harm suffered. Both initiatives pay little attention to the simple truth that an environmentally sustainable path may completely exclude certain projects. Thus, harm can be only avoided by renouncing the project altogether at the community's request. It is to be noted that the Environmental and Social Policies (ESPs) of several Multilateral Development Banks (MDB) require the examination of the 'no-project alternative.'³¹ However, in practice, the analysis of alternatives is limited to the obviously inconvenient ones.³²

The International Bar Association (IBA) also stepped into the debate in 2014, mainly by advocating a freestanding right to a clean environment, which would permit claims by citizens and communities against states or corporations infringing on this right.³³ As it acknowledges the difficulties in attaining this purpose in the short or medium term, IBA strongly advocates the use, in the meantime, of the above mentioned PCA Optional Rules.

²⁹ See, for a critique, Ole W. Pedersen, *An International Environmental Court and International Legalism*, 24 J. ENVTL. L. 547 (2012).

³⁰ WORLD BANK, THE INSPECTION PANEL AT THE WORLD BANK: OPERATING PROCEDURES (2014), para. 39.

³¹ See e.g. Asian Development Bank (ADB), *Safeguard Policy Statement*, June 2009, at 16; Asian Infrastructure Investment Bank (AIIB), *Environmental and Social Framework*, August 2015, at 21; European Bank for Reconstruction and Development, (EBRD) *Environmental and Social Policy*, May 2014, at 12.

³² Erin K. MacDonald, *Playing by the Rules: The World Bank's Failure to Adhere to Policy in the Funding of Large Scale Hydropower Projects*, 31 ENVTL. L. 1011, 1025 (2001).

³³ International Bar Association (IBA), *Achieving Justice and Human Rights in an Era of Climate Disruption*. Climate Change Justice and Human Rights Task Force Report (July 2014).

D. BRINGING SUSTAINABILITY TO THE GRASSROOTS

One particular instance of the above mentioned international environmental consensus is the articulation of the sustainable development (SD) framework. SD, as the master-frame that it has become, is of no significant relevance in the real world,³⁴ unless it is brought back to the grassroots:

Far from the gleam of international diplomats, corporate boardrooms, powerful donor agencies, and supranational conferences, a ‘really existing’ sustainable development survives and thrives where it always has – at the grassroots, in the same fields and neighborhoods, and in the same hands and minds in which its original promise was born.³⁵

CIEA would achieve exactly this desideratum: moving the quest for sustainable development at the local level. Admittedly, various international networks of local activism, such as the International Council for Local Environmental Initiatives (ICLEI) or the Climate Alliance, are already involved in stimulating the creation of sustainable communities, which are the drivers of the sustainability efforts in their models of action. However, in this top-down model, interpretation and implementation of environmental protection locally becomes a political issue³⁶: it largely depends on the local governments' view of sustainability and then on the degree of autonomy they are given by central authorities. Instead of this, CIEA would place the decision in the community's hands.

³⁴ For critiques of the sustainable development construct and the reasons behind its failure to make a change in the real world, see among many others David Carruthers, *From Opposition to Orthodoxy: The Remaking of Sustainable Development*, 18 J. THIRD WORLD STUD. 93 (2001); Subhabrata Bobby Banerjee, *Who Sustains Whose Development? Sustainable Development and the Reinvention of Nature*, 24 ORG. STUD. 143 (2003); David G. Victor, *Recovering Sustainable Development*, 85 FOREIGN AFFAIRS 91 (2006).

³⁵ Carruthers, *id.* at 105.

³⁶ HARRIETT BULKELEY & MICHELLE M. BETSILL, CITIES AND CLIMATE CHANGE: URBAN SUSTAINABILITY AND GLOBAL ENVIRONMENTAL GOVERNANCE 185 (2003).

E. AVOIDING VIOLENT CONFRONTATIONS BETWEEN COMMUNITIES AND INVESTORS

Passive political and social power of communities can easily evolve towards active power in the interconnected world and challenge the corporate-government nexus of power. Once the community becomes an activist community in reaction to real or perceived environmental threats, it may oppose a project by such means as street blockades and building coalitions beyond the community borders to such an extent that in the end it may block, or at least significantly delay, corporate projects. Such radicalization can occur in poor communities which have been historically targeted by noxious investment as a quest for environmental justice, but also in richer and greener communities as a reaction to the alteration of their habitat.

In some countries, community and societal pressure can even result in state decisions that question development at the national level while strongly turning the balance in favor of environmental protection, which has recently happened in countries like Costa Rica and El Salvador.³⁷

CIEA, from the investor's perspective, would address both the localized escalation of tensions with local activist communities and the risk of whole countries turning 'green.' At the local level, given the involvement of a third independent party, CIEA may help communities feel respected as a genuine stakeholder with a voice and negotiable benefits from investment projects, which could defuse tensions. At the national level, broad societal pro-sustainability pressures, leading to indiscriminate governmental action against all potentially polluting investments, will be discouraged since communities can resolve environmental issues locally.

CIEA would also create the foundation for a more reasoned understanding than it is usually reached in crisis bargaining and a longer lasting one than that reached in mediation where the conflict is not resolved but postponed: the community as the 'losing' party will often attempt to reverse its defeat at the earliest possible opportunity.³⁸ Arbitration, however, may not bring about this risk

³⁷ Robin Broad & John Cavanagh, *Poorer Countries and the Environment: Friends or Foes?* 72 WORLD DEVELOPMENT 419 (2015).

³⁸ Burgess & Burgess, *supra* note 11.

because “creating and employing mechanisms that allow confrontation . . . within the existing system may stimulate the development of further rights-protective problem-solving mechanisms, thus minimizing the potential for future conflict.”³⁹

So, instead of simply abandoning the project in cases of failure to achieve the SLO, as it was suggested in academia,⁴⁰ or requiring imposition by authorities, the corporation will have a last chance to reach a deal with local community members.

II. THE FEATURES OF CIEA

A. TYPE OF ARBITRATION, APPLICABLE LAW, FORUM

To achieve its objective, namely to enhance environmental justice by filling procedural and conceptual gaps in community participation, CIEA should be interest (that is, prospective) arbitration. In the U.S., interest arbitration is an alternate impasse procedure; an extension of the bargaining process whereby issues not resolved in contract negotiations between an employer and a union are decided by impartial arbitrators.⁴¹ The rationale for the adoption of this policy device⁴² was that while strikes are a legitimate pressure tool in the hands of employees to achieve the conditions they want in the collective labor agreement, side effects of strikes on the protesters, business, and society at large are often negative.⁴³ For laborers not allowed to strike, e.g., fire-fighters or police officers,

³⁹ Barbara R. Johnston, *Crisis, Chaos, Conflict and Change*, in *LIFE AND DEATH MATTERS: HUMAN RIGHTS AND THE ENVIRONMENT AT THE END OF THE MILLENNIUM* 9, 19 (Barbara R. Johnston ed., 1997).

⁴⁰ Kathleen M. Wilburn & Ralph Wilburn, *Achieving Social License to Operate Using Stakeholder Theory*, 4 J. INT'L BUS. ETHICS 3 (2011).

⁴¹ Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH. J. L. REFORM 313 (1993).

⁴² See Barry Winograd, *An Introduction to the History of Interest Arbitration in the United States*, 61 Lab. L.J. 164 (2010) (Providing a brief incursion into the history of interest arbitration in the US); See also Amy Moor Gaylord, *Interest Arbitration - Pros, Cons and How Tos*, ABA 2010 Annual Meeting Section of Labor and Employment Law, Aug. 5, 2010 (San Francisco, CA) (Providing examples of the various types of interest arbitration and how they work).

⁴³ See Joseph R. Grodin, *Political Aspects of Public Sector Interest Arbitration*, 64 CAL. L. REV. 678, 679 (1976).

interest arbitration to solve bargaining deadlocks is required by state laws;⁴⁴ for the other categories, it is an option available to the parties.

The deadlocks sometimes occurring in investor-community engagement are similar to those in employer-trade union negotiations for the collective labor agreement. Therefore, there is no reason to reject interest arbitration as a mechanism to resolve a bargaining dispute between two private entities. Interest arbitration is of prospective character, presupposing the negotiation of a new 'contract' with the assistance of the arbitral panel, as opposed to rights or grievances arbitration, which is retrospective and assesses the parties' behavior against an already established contractual relation. The latter is so far the only type of arbitration encountered or proposed in the environmental field. CIEA's novelty is that it aims to establish a 'treaty' between the investor and the community, thus being superior to mediation, in which the final agreement lacks a similarly strong or official status. In fact, non-binding arbitration comes immediately above mediation in the spectrum of ADR processes, being more formal and involving more mandatory procedures, thus it is a logical further step to take in resolving community-corporate environmental disputes.

Aside from being interest arbitration, CIEA should be non-mandatory, non-binding, parcel-based, confidential, multi-party arbitration. The non-binding character serves as a compromise meant to not inhibit consent to arbitration of the more powerful entity—a legitimate concern given the asymmetric status of parties in a typical case. The parcel-based approach involves considering the issue as a local matter and not in the public (regional or national) interest. Together with the confidentiality observed in any type of arbitration, the parcel-based approach avoids the emotional loading that often leads to deadlocks when wider segments of society stand for what they perceive is a public interest. This approach gives greater chances to a last minute compromise between communities and corporate investors. The multi-party character, allowing participation of interested governmental officials, plus the 'arbitrators' as quality environmental experts, provide guarantees that the possible agreement will not violate a minimum environmental standard, and thus will not lead to a race to the bottom.

⁴⁴ Arvid Anderson & Loren A. Krause, *Interest Arbitration: The Alternative to the Strike*, 56 FORDHAM L. REV. 153, 154-5 (1987).

With regard to applicable law, it could be established that a community veto would not stand if the project is consistent with the highest of applicable international and domestic environmental standards, and the project should be halted if not consistent with the lowest. The first situation ensures that communities will not arbitrarily block development. In the second situation, arbitration functions as a check and balance system to prevent states that are willing, in a desperate quest for foreign capital, to turn a blind eye to breaches of their own environmental laws. This flexible approach, establishing a floor and a ceiling between which the competing claims of community and investors can evolve, reflects the lack of international agreement on where exactly environmental protection stands among issues like development or distribution. Lack of agreement on these matters is mainly encountered in the North/South divide, but sometimes also between countries at the same level of development, see comparatively the approach towards genetically modified organisms in US and Europe, or the approach towards rainforest protection around the world.

The gap between the highest and the lowest applicable environmental standard may be wide enough to confuse arbitrators and parties, therefore a communal Indicator of Sustainable Development (ISD) should be added. Indexes of this sort are common in the Western world,⁴⁵ and are devised based on a variety of factors pertaining to all the three components of sustainable development: environmental protection, social equity, and economic growth. One complaint of the planners is that ISDs are so vague that they are useless in practice. However, with CIEA adoption, ISDs will become helpful in arbitrating a community's consent because "they are an indicator of the motivation of people . . . to measure the well-being of their communities along additional axes besides economic wealth."⁴⁶ In short, ISDs, assessed by the independent body that manages the CIEA, could encompass all the manifestations of local sustainability, such as recycling, organic agriculture, efficient use of water, use of public transportation over individual cars, and prevalence of green energy. Additionally, social equity could be present as a qualifying factor, in the form of historical environmental

⁴⁵ See Clark A. Miller, *New Civic Epistemologies of Quantification: Making Sense of Indicators of Local and Global Sustainability*, 30 SCI. TECH. & HUM. VALUES 403 (2005) (Discussing five ISDs).

⁴⁶ *Id.* at 417.

injustice. Communities with a high ISD would maximize the weight of their argument in CIEA to the extent that, in limited cases, the communities could acquire a right to veto a project with a high environmental impact. This aspect differentiates CIEA from labor interest arbitration, in which the arbitrator settles the dispute mainly based on external comparables⁴⁷ (wages, hours, and terms and conditions of employment of similar employees in comparable units of public employment). In CIEA, comparison may be unrealistic due to the complexity of intermingling social, economic, and historical factors.

Implementation of CIEA would require the appropriate forum, and currently the most practical solution to host such arbitral proceedings may be the PCA seated in The Hague. The PCA Optional Rules for Arbitration of Environmental Disputes⁴⁸ are an adaptation of the UNCITRAL Arbitral Rules. More specifically, the PCA's adaptation reflects the particular characteristics of disputes that have a natural resources conservation component or an environmental protection component. The *prêt-à-porter* character of the rules⁴⁹ makes them largely compatible with all the CIEA characteristics described in previous subsections of this paper. Additionally, because parties may select a panel of arbitrators with experience in environmental law, the PCA can provide both juridical and scientific support to the parties.

B. JURISDICTION

Jurisdiction should be construed in a broad manner as to encompass any situation of immitigable local opposition to an investment project with significant impact on the environment. The only condition should be the exhaustion by the community of the local administrative and judicial avenues, as applicable. This broad approach is justified by the incomplete institutional system necessary to ensure community environmental participation, which is

⁴⁷ ALAN MILES RUBEN (ED.), ELKOURI & ELKOURI: HOW ARBITRATION WORKS 1407 (6th ed. 2003).

⁴⁸ Permanent Court of Arbitration (PCA), *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment*, 41 I.L.M. 202 (2002).

⁴⁹ Dane P. Ratliff, *The PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment*, 14 LEIDEN J. INT'L. L. 887, 895 (2001).

incongruous with the accepted view that a meaningful community involvement is at the confluence of environmental justice and sustainability.⁵⁰

Some problems arise when it comes to personal jurisdiction: how do you define the ‘community’ that can bring a CIEA claim? In characterizing communities, scholars usually use such variables as geography, interaction, and identity.⁵¹ CIEA should have as a starting point the geographical, spatial criterion: affected communities, also termed ‘fenceline’ communities in some studies,⁵² delimited by the upper limits of project externalities impact.⁵³ The remaining criteria, interaction and identity, may further play a role in defining the spatial community’s will. However, this should happen only insofar as they are contained into the geographical space and not diffusing, for instance, through the social media, into a national or international community of interest, which would affect the parcel-approach of CIEA.

In defining the community spatially, the first issue to clarify is the representativeness of the local administration organs, as far as CIEA is concerned. Seeing local administration as a proxy for the community is a tempting option given the already mentioned success of some local government led sustainability initiatives. In addition, central governments often promote the role of local authority as ‘community leader.’⁵⁴ To this end, tools have been devised to ensure decision-makers take into account the community options. Multi-criteria decision analysis (MCDA), for instance, is deemed to be particularly suitable for environmental decisions. It was argued that

⁵⁰ Julian Agyeman & Tom Evans, *Toward Just Sustainability in Urban Communities: Building Equity Rights with Sustainable Solutions*, 590 ANNALS AM. ACAD. POL. & SOC. SCI. 35, 36 (2003).

⁵¹ Laura Dunham, R. Edward Freeman & Jeanne Liedtka, *The Soft Underbelly of Stakeholder Theory: The Role of Community*, Darden Graduate School of Business Administration, University of Virginia Working Paper No. 01-22 (2001).

⁵² See e.g. EDMUND M. BURKE, CORPORATE COMMUNITY RELATIONS: THE PRINCIPLE OF THE NEIGHBOR OF CHOICE 63 (1999).

⁵³ Which for example in the case of landfills is 6 km. Susana Ferreira & Louise Gallagher, *Protest Responses and Community Attitudes Toward Accepting Compensation To Host Waste Disposal Infrastructure*, 27 LAND USE POL’Y 638, 643 (2010).

⁵⁴ Taylor, *supra* note 18, at 307.

the clear and consistent formulation of objectives and valuation of decision alternatives in MCDA leads to selection, by decision makers, of the alternative revealed as most socially desirable.⁵⁵

But this is not enough in the CIEA framework. In an MCDA perspective for example, the local government decision to support a claim would have to rely on criteria weights, but these do not always reflect community's interests. For example, in the Netherlands, a court ruled against an MCDA model that had been relied upon in order to site a waste disposal facility. The court found the criteria weights were not aligned with community values.⁵⁶ The involvement of local authorities in CIEA is welcome, but not a *sine qua non* condition; besides, it is unlikely since often they would have already issued permits to the investor. Even when this is not the case, considering local governments as a proxy for the 'community' would be misleading because the diversity of a community's interests makes it impossible for the administration to accurately mirror them comprehensively.⁵⁷ For all these reasons, authorities' role should be limited to coordination and facilitation – or not even so, because such activities can be done by a citizens' ad-hoc committee. As shown by a study undertaken in Sweden, real grassroots movements presuppose extended freedom of choice to locals, rather than guidance by experts and the administration.⁵⁸

A voting process, meant to aggregate preferences and reveal whether there exists a common will within the community, can operationalize this freedom. Voting would additionally provide a voice to different subgroups within the community (e.g., sub-communities of interest or identity such as job seekers, environmentalists, parents, ethnic minorities). The social choice theory offers both a suitable conceptual framework and a practical tool in aggregating sub-community preferences. Social choice problems generally arise in the following conditions, met in our case:

⁵⁵ Catherine D. Gamper & C Turcanu, *On the Governmental Use of Multi-Criteria Analysis*, 62 ECOLOGICAL EC. 298 (2007).

⁵⁶ Ron Janssen, *On the Use of Multi-Criteria Analysis in Environmental Impact Assessment in the Netherlands*, 10 J. MULTI-CRITERIA DECISION ANALYSIS 101, 107 (2001).

⁵⁷ Dunham et al, *supra* note 51, at 13.

⁵⁸ Jan Olsson, *Sustainable Development from Below: Institutionalizing a Global Idea-Complex*, 14 LOCAL ENV'T. 127 (2009).

First, there must be two or more actors having some degree of autonomy with respect to their choice behavior. Second, the actors must be interdependent in the sense that the outcome to reach will be affected by the choices of the others. This condition is often stated in terms of the concept of strategic interaction. Third, the preference orderings of the actors over the relevant alternatives must be non-identical, though they need not be strictly opposed.”⁵⁹

The investor-community conflict over the siting is a matter pertaining to social choice and can be resolved using its mechanisms, since social choice can be conceptualized as a form of dispute settlement.⁶⁰ All the directions along which the conflict evolves are suitable for scrutiny under this theoretical framework. The first type of conflict, between a corporation and the community, is resolved through the social choice mechanisms of negotiation, mediation and—as proposed in this paper—arbitration. The conflict between government and local communities is resolved through judicial and administrative mechanisms, while the conflict within the community, between supporters and opponents (strictly on environmental grounds) of the project, can be resolved through voting, as the most important mechanism of social choice. All that is needed is the design of a voting method as aggregation mechanism to ensure that a consistent Community Will exists within the fence line community.

In fact, the idea of communities called to state their acceptance or rejection of potentially polluting siting is not new: some three decades ago it was proposed by scholars who saw local referenda organized by investors as solutions for avoiding siting deadlocks in the Western world.⁶¹ Arbitration is less radical and more conceptually congruous with existent substantive and procedural applicable rules. When done with the purpose of identifying the community’s will in view of a possible CIEA claim, the vote is neither the initial nor the final step in the siting negotiation. Rather, it comes as the culmination of long-term opposition along classical

⁵⁹ *Id.* at 245. Oran R. Young, *Anarchy and Social Choice: Reflections on the International Polity*, 30 *WORLD POLITICS* 241, 245 (1978).

⁶⁰ *Id.* at 246.

⁶¹ Robert Cameron Mitchell & Richard T. Carson, *Property Rights, Protest, and the Siting of Hazardous Waste Facilities*, 76 *AM. ECON. REV.* 285 (1986).

avenues, but it opens the door for final negotiation of a rejection that had been made clear along such avenues.

To this aim, and given that prior to arbitration the community has consistently opposed the project, a predictable large majority of roughly two-thirds in favor of arbitration (and thus opposing the project on environmental grounds) should be seen as indicative of a general community will. Such a majority is morally compelling enough; but even so, conditions should be created for the minority—when it exceeds a certain threshold, for example twenty percent—to participate in arbitration, as multi-party arbitration is proposed.

These quantitative details can be crafted by the body that will undertake management of the arbitral process. What matters is that locals determine the community's will along the moral dimension of environmental protection, unveiled by the aggregation mechanism of voting, which gives the community standing in arbitration as a corporate entity. Although less likely, it is possible that voting will cast a feeble majority, in which case no community will can be discerned. For example, such an outcome may be the result of preference intensity,⁶² with those favoring the project displaying significantly higher intensity than the opponents show in their devotion to environmental sustainability. If this were to occur, the arbitration could still move forward as a class claim so long as a significant proportion of opponents exist.

III. ACCEPTABILITY BY STAKEHOLDERS: THE PROBLEM OF CORPORATE CONSENT

A. IMPLICIT OR EXPLICIT CONSENT IN THE CSR CODES

In 2008, a comprehensive analysis of *The Economist* noted with regret that Corporate Social Responsibility (CSR) has won the battle of ideas, but without really working.⁶³ CIEA is a good chance to make CSR work in a palpable way—by incorporating investor consent to environmental arbitration.

In an extreme interpretation, consent may even be implied by employing the common law's doctrine of estoppel. Estoppel, the

⁶² Donald E. Campbell, *Social Choice and Intensity of Preference*, 81 J. POL. ECON. 211 (1973).

⁶³ *The Next Question: Does CSR Work?* THE ECONOMIST, special report, January 17, 2008. www.economist.com/node/10491055.

voluntary creation of an appearance on which the other party in a relation prejudicially relied, is among the reasons that could compel a non-party to an arbitration agreement to accept arbitration.⁶⁴ The prejudice is lacking in our case, but this element is not essential in the more recent application of this centuries-old doctrine. Having surveyed over two hundred estoppel cases, a study found that “the underlying legal policy is to protect the ability of individuals to trust promises in circumstances in which that trust is socially beneficial.”⁶⁵ Strongly analogical with the case of corporate commitments to seek communities’ licenses prior to operating in their neighborhoods:

First, [] the promisor's primary motive for making the promise is typically to obtain an economic benefit. Second, the enforced promises generally occur in the context of a relationship that is or is expected to be ongoing rather than in the context of a discrete transaction. These relationships are characterized by need for high level of mutual confidence and trust.⁶⁶

Trust is the essence of the corporate relations with all its stakeholders, including local communities. The firm promises in its CSR codes to take locals’ grievances in consideration, seeking to create the appearance of a responsible player and to obtain an economic benefit. With the environmental concerns as a legitimate grievance even in the absence of a human right status, the community’s expectation to be given access to an arbitral tribunal as part of the company commitment of community engagement, would be perfectly consistent with the view that “once in [a human rights code of conduct], exiting can be costly.”⁶⁷

⁶⁴ J. Douglas Uloth & J. Hamilton Rial, III, *Equitable Estoppel as a Basis for Compelling Nonsignatories to Arbitrate - A Bridge Too Far?*, 21 REV. LITIG. 593, 598 (2002).

⁶⁵ Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the “Invisible Handshake,”* 52 U. CHI. L. REV. 903, 905 (1985).

⁶⁶ *Id.* at 925.

⁶⁷ Human Rights Council, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, P 77 U.N. Doc. A/HRC/4/035 (Feb. 9, 2007) (prepared by John Ruggie, Special Representative of the Secretary-General).

My proposal does not go that far. I suggest creating useful CSR codes by making them available to an explicit consent to arbitration. In investor-state dispute settlement (ISDS), where firms bring claims, states provide consent in BITs in the investment agreements with the firm, or even directly in their legislation.⁶⁸ In CIEA, where there is no contractual relation between the two entities, a firm could provide consent to arbitration in its CSR code. This procedure is similar to states that insert such dispute resolution mechanisms in their domestic laws. In ISDS the state accepts an international arbitral forum in exchange for higher investment influxes; in CIEA the firm would accept it in order to build trust with communities, which is ultimately sound business practice.

The agreement reached after mediation could also host the corporate explicit consent. This was the solution adopted in 2005 by the Vienna Airport AG. In that case, the Vienna Airport AG, acting as an investor intending to develop night flights, and the local community affected by the subsequent noise and air pollution successfully negotiated environmental mediation. The resulting resolution between the parties established that future problems would be resolved in the Dialogue Forum Vienna International Airport. In case of failure, the issue would be resolved by arbitration and, to this end, they signed an arbitration agreement.⁶⁹

⁶⁸ See, e.g., the Albanian Law No. 7764 of Nov. 2, 1993, which states:

If a foreign investment dispute arises between a foreign investor and the Republic of Albania and it cannot be settled amicably, then the foreign investor may choose to submit the dispute for resolution to a competent court or administrative tribunal of Republic of Albania in accordance with its laws. In addition, if the dispute arises out or relates to expropriation, compensation for expropriation, or discrimination ... then the foreign investor may submit the dispute for resolution and the Republic of Albania hereby consents to the submission thereof, to the International Centre for Settlement of Investment Disputes....

⁶⁹ Martina Handler, Lisa Purker, Dana C. Romanescu & Kaidi Tingas, *Promoting Environmental Mediation as a Tool for Public Participation and Conflict Resolution: A Comparative Analysis of Case Studies from Austria, Germany and CEE Countries*. Regional Environmental Center, Final Report (2005).

Why would investors consent to CIEA? A comparison with the field of labor is illustrative to show the benefits of CIEA to investors. Mandatory arbitration, popular in the U.S. in a variety of fields, was initially devised in the field of labor with the intent of protecting the public from the harmful effect of strikes.⁷⁰ Similarly, arbitrating consent in the administrative forums and in direct investor-community negotiation and mediation after all other means have been exhausted would avoid harmful street blockades and violent protests that affect both the public and the investor. The investor is affected because its international reputation is damaged.

Consent provided at industry level may also be feasible—similar to the Voluntary Agreement used in the Nordic countries and in the Netherlands.⁷¹ The advantage of adopting a coordinated solution at industry level, instead of leaving it for the choice of each firm active in that industry, would be the mitigation of comparative advantage losses. Firms that consent to CIEA may be more vulnerable to economic loss than those that do not, for example by conceding, in CIEA, to more stringent environmental standards upon community demands.

*B. ALTERNATIVELY, RELYING ON A MULTILATERAL DEVELOPMENT BANK
AS CHAMPION*

Having consent included in the CSR codes at firm or industry level is a rather idealist stance. A more realist perspective is reliance on the financiers of large investment projects or on ministries in the host countries to promote this experimental institution.

A Multilateral Development Bank (MDB) could be the CIEA initiator. An MDB's incentive may include insulation from potential liability by allowing communities to secure their own deals as far as the environment is concerned. Insulation from liability may come in the context of increased academic and civil society claims regarding

⁷⁰ See, e.g., Malin, *supra* note 41, fn. 79 (listing numerous studies confirming that when interest is allowed, strikes are almost totally eliminated).

⁷¹ A Report from: The Nordic Council of Ministers, Stockholm, January 1998, *Using Voluntary Agreements in Environmental Policy: a Reinforcement of the Dialogue with Industry*.

development lenders' liability for environmental harm done in the borrowing countries.⁷²

International organizations like MDBs spread norms by forming international agendas, constructing discourse, and enforcing rules.⁷³ In particular, it was empirically demonstrated that the international development bank community played an important role in the enactment of fundamental environmental legislation.⁷⁴ The problem with an innovative mechanism like CIEA is that it may affect the comparative advantage of its promoter. Even though the objectives of development banks are not primarily financial, as is the case with commercial banks, they are still competitors on the development 'market'.⁷⁵ This is even more so after two new development banks—the Asian Infrastructure Investment Bank and the New Development Bank—started their operations in 2016. In this crowded market, MDBs would normally not be interested in supporting a policy that may render borrowers unhappy; the European Bank of Reconstruction and Development (EBRD) has however some features making it the right candidate in terms of both value and interest.

First, it is the only MDB that has specific references to the environment in its Articles of Agreement.⁷⁶ Numerous policies

⁷² For an overview and assessment of civil society's arguments that MDBs are ineffective, undemocratic, secretive, and facilitate environmental destruction, see John V. Head, *For Richer or for Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks*, 52 KAN. L. REV. 241 (2004); for environmental claims against the World Bank, see Mark T. Buntaine, *Accountability in Global Governance: Civil Society Claims for Environmental Performance at the World Bank*, 59 INT'L STUD. Q. 99 (2015).

⁷³ Susan Park, *The World Bank Group: Championing Sustainable Development Norms?*, 13 GLOBAL GOVERNANCE 535, 536 (2007).

⁷⁴ Ann Hironaka, *The Globalization of Environmental Protection: The Case of Environmental Impact Assessment*, 43 INT'L J. CUBAN STUD. 65 (2000).

⁷⁵ Klaus Liebig & Peter Wolff, *Financing for Development Series: Development Finance by Regional Development Banks – Combining Regional Ownership with Multilateral Governance*, German Development Institute Briefing Paper, October 2008. http://www.die-gdi.de/uploads/media/BP_10.2008.pdf.

⁷⁶ See Agreement Establishing the European Bank of Reconstruction and Development (1991) at Article 2-vii, available online at <http://www.ebrd.com/news/publications/institutional-documents/basic->

adopted in recent years confirmed EBRD's constitutional commitment.⁷⁷ Second, while all development banks (with the exception of the Islamic Development Bank and the recently created Asian Infrastructure Investment Bank) have created grievance mechanisms allowing affected communities to complain directly to the lender when the lender breaches its own procedures, EBRD's Project Complaint Mechanism (PCM) is the only one with both compliance review competences and a problem-solving role.⁷⁸ Third, EBRD assumes a regulatory role for environmental complaints which requires clients to implement their own effective grievances mechanisms.⁷⁹ These policies show that the terrain is fertile at EBRD for a CIEA-support policy. The policy may be in the form used by the private banks that have adhered to the Equator Principles, a Covenant attached to the lending contract in which the borrower commits to certain social obligations. In this case, the respective obligation may be to consent to CIEA. In this regard, it is very important that the majority of EBRD loans (a minimum 60%) go to the private sector. This means that the bank will have direct leverage on the project operator without the state as borrower-intermediary.

An alternative solution for fostering corporate consent may involve relevant ministries (such as economy and environment). These may act in the same way, tying acceptance of CIEA to benefits for investors. The possibility of avoiding decisions unpopular in some communities and of passing the responsibility of environmental protests to the corporate hands would make governments happy; the same mechanism that makes unions happy with the existence of interest arbitration would work. "Arbitration became very popular, though expensive. But their cost, the union believed, was offset by

documents-of-the-ebrd.html%20 (committing "to promote in the full range of its activities environmentally sound and sustainable development.").

⁷⁷ For an analysis of the constitutional policy adoption trend see Stefan Buzar, *Energy, Environment and International Financial Institutions: The EBRD's Activities in the Western Balkans*, 90 GEOGRAFISKA ANNALER. SERIES B, HUM. GEOGRAPHY 409, 421-3 (2008).

⁷⁸ "A problem-solving initiative might include independent fact-finding, mediation, conciliation, dialogue facilitation, investigation or reporting." See EBRD, *About the Project Complaint Mechanism*, <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/about.html>.

⁷⁹ EBRD, *supra* note 31, at 54-8.

the advantage of passing the buck to the arbitrator rather than making a decision unpopular to their members.”⁸⁰

Finally, it should be noted that in the EU context, the involvement of either EBRD or a national body (or both) will find a fertile terrain, given the recent EU approach of encouraging class arbitration.⁸¹

IV. CONCLUSION

This article introduced CIEA as an interest, non-mandatory, non-binding, and multi-party arbitration tool available to local communities that oppose polluting development projects within the immediate vicinity of the community. For cases of this sort, international norms envisage negotiation and mediation only as appropriate dispute resolution mechanisms, but conceptual and practical arguments discussed throughout the paper suggest that CIEA could and should also be considered a worthwhile option. Obviously, CIEA stands as a legitimate option only for democratic countries, and the best suited are the EU members, given the high standards of environmental participation laid down in the Aarhus Convention.

From a political perspective, CIEA may be rejected as radically libertarian: once we allow communities to arbitrate consent on corporate projects, we enter a field dangerously close to anarchism, or at least minarchism—the political ideology advocating a minimal state that does not interfere with individual rights. However, the solution proposed in this article would only provide communities with an exit option through adherence to all the democratic processes generally termed ‘participation’. CIEA is a last attempt to move potential conflict between a community standing against the alteration of its environment and the investor acting in the name of development from the streets to the arbitral tribunal; the parallel with

⁸⁰ Arthur M. Ross, *Distressed Grievance Procedures and Their Rehabilitation*, in LABOR ARBITRATION AND INDUSTRIAL CHANGE 104, 133 (Mark L. Kahn ed., 1963).

⁸¹ Lukasz Gorywoda, *The Emerging EU Legal Regime for Redress: Institutional Dimensions and Its Main Features*, in CROSS BORDER CLASS ACTIONS: THE EUROPEAN WAY 173 (Arnaud Nuyts & Nikitas E. Hatzimhail eds., 2014).

the interest arbitration used in the United States to prevent strikes is suggestive.

From a consequentialist perspective, some may ask whether the adoption of such an institution will not bring more harm than good. The main benefit of CIEA is that it deters violent protests, but we should not forget that labor arbitration in U.S. was found to have a chilling effect on negotiations, while not significantly reducing the number of strikes.⁸² Similarly, availability of arbitration may make the community more inflexible along the process of engagement, rejecting projects that would be economically beneficial and environmentally harmless. CIEA, therefore, must be construed strictly as an extension of the negotiation process. The community's preference for an ecologically sustainable mode of life should not be economically irrational, which is why CIEA should use experts for an assessment of the social net benefits of the two alternatives: material presented in the investor's documentation—supposedly, already balanced against other alternatives in the EIA—and the “no project” alternative.

In truth, adopting the institution of CIEA requires exceptional leadership and political will, but these are necessary ingredients in any honest initiative in the complex and challenging field of sustainability. If the “corruption paradox” means that corruption is universally condemned yet universally present, we may say that the sustainability paradox is, on the contrary, that sustainability is universally hailed yet universally absent. As long as sustainability is kept at an abstract enough level, it is enthusiastically embraced by governments, industries, and citizens, but when it comes to making dramatic choices between development and ecology, all truly impacting solutions may seem idealistic.

Indigenous communities were afforded the choice between development and ecology when their right to free, prior, and informed consent was recognized. In strict conditions rooted in full recognition of the importance of business, certain communities—at least those with a demonstrable appetite for environmental sustainability—should also be given this choice, operationalized

⁸² See Grodin, *supra* note 43, at 680; see also Malin, *supra* note 41, at 330-32.

through CIEA. Ideally, multinational investors should consent to CIEA in their CSR codes to build trust with host communities; after all, the arbitration would be non-binding. However, in the event investors fail to take these steps, Multilateral Development Institutions or ministries in democratic states should consider laying the first brick of the new arbitral mechanism.